Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

LESLIE GURDON, LAKE IMPORTS, INC., SMITHTOWN IMPORTED CARS, INC., L & L CYCLES, LTD. and LAKE CYCLES, LTD.,

Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver of RIVERHEAD SAVINGS BANK, FSB and AMERICAN SAVINGS BANK, FSB,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

1. May 12 U.S.C. § 1823(e) — which expressly invalidates any "agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it . . ." — be utilized to invalidate an agreement between petitioners and the failed bank, or to exclude any evidence of such an agreement, where the FDIC never acquired or owned an asset relating to the petitioners, and the petitioners do not seek to diminish or defeat the FDIC's interest in any such asset?

2. Did the District Court err in applying 12 U.S.C. § 1823(e) to this case, in which there was no such "asset", where five United States Circuit Courts of Appeals — the only five which had rendered opinions on the issue — had all found that the statute was not applicable in the absence of such an "asset"?[1]

3. Where the District Court erroneously excluded evidence based upon its misapplication of 12 U.S.C. § 1823(e) — evidence which was vital to plaintiffs' establishing their position on a separate issue in the case (the issue of the failed bank's alleged good faith belief in the financial insecurity of the plaintiffs) — did the Second Circuit Court of Appeals err in finding that the issue of the District Court's misapplication of 12 U.S.C. § 1823(e) was moot, and in declining to reach

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[1] Thigpen v. Sparks, 983 F.2d 644 (5th Cir. 1993); FDIC v. Bracero & Rivera, Inc., 895 F.2d 824 (1st Cir. 1990); Commerce Federal Savings Bank v. FDIC, 872 F.2d 1240 (6th Cir. 1989); Grubb v. FDIC, 868 F.2d 1151 (10th Cir. 1989); FDIC v. Merchants National Bank of Mobile, 725 F.2d 634 (11th Cir.), cert. denied, 469 U.S. 829, 105 S.Ct. 114, 83 L.Ed. 2d 57 (1984).

it, merely because the FDIC had prevailed before the jury on the said "financial insecurity" issue?[2]

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[2] Petitioners believe that both the District Court and the Court of Appeals erred, as a matter of law, in allowing the FDIC to raise this defense and litigate this issue at all. Although this is not the ground upon which certiorari is sought, we seek to preserve, to the extent allowed, our right to argue this issue as well, if this Court chooses to grant certiorari on the primary "D'Oench" issue.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

The names of all parties to the proceeding in the court whose judgment is here sought to be reviewed appear in the caption of this case. Pursuant to Rule 29.1 of the Rules of this Court, none of the four corporate petitioners has any parent company or subsidiary.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995
No._____

LESLIE GURDON, LAKE IMPORTS, INC., SMITHTOWN IMPORTED CARS, INC., L & L CYCLES, LTD. and LAKE CYCLES, LTD.,

Petitioners,

- against -

FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver of RIVERHEAD SAVINGS BANK, FSB and AMERICAN SAVINGS BANK, FSB,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

LESLIE GURDON, LAKE IMPORTS, INC., SMITHTOWN IMPORTED CARS, INC., L & L CYCLES, LTD. and LAKE CYCLES, LTD., the petitioners herein, pray that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Second Circuit entered in this action on January 9, 1995, and upon which a Petition for Rehearing was denied by Order dated July 12, 1995.

OPINIONS BELOW

The Opinion and Order of the United States Court of Appeals for the Second Circuit, disposing of the appeal of petitioners herein from the Judgment of the United States District Court, rehearing of which was sought in said court, and review of which is now sought in this Court, will not, according to a note endorsed thereupon, have been published in the Federal Reporter and, to the best of counsel's knowledge, has not been reported elsewhere. The Opinion of the United States Court of Appeals for the Second Circuit, denying the Petition for Rehearing of petitioners herein (appellants below) is, so far as is known to counsel, not yet published. That Order affirmed the Judgment, rendered after trial by jury, of the United States District Court for the Eastern District of New York, following a defendant's verdict. The District Court issued no written decision subsequent to the jury trial. It did, however, render written orders on two pre-trial motions.

Copies of these Opinions and Orders are in the Appendix.

JURISDICTION OF THIS COURT

Petitioners ask that this Court review the Order of the United States Court of Appeals for the Second Circuit, entered January 9, 1995, affirming the Judgment of the United States District Court for the Eastern District of New York, following the denial by the Court of Appeals of a petition for rehearing by Order dated July 12, 1995. Jurisdiction is conferred upon this Court by Title 28, United States Code, Section 1254, paragraph (1).

PROVISIONS OF LAW INVOLVED IN THIS CASE

The provision of law involved in this case on this Petition is:

12 U.S.C. § 1823(e):

(e) **Agreements against interests of Corporation.** No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 11, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement —

(1) is in writing,

(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligee, contemporaneously with the acquisition of the asset by the depository institution,

(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(4) has been, continuously, from the time of its execution, an official record of the depository institution.

New York Uniform Commercial Code § 1-208

Option to Accelerate at Will

A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will"

or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

STATEMENT OF THE CASE CONTAINING THE MATERIAL FACTS

Petitioners, four motor vehicle dealerships and their principal stockholder and president, Leslie Gurdon (hereinafter referred to as "Gurdon"), commenced this action in the Supreme Court of the State of New York for the County of Suffolk in July 1989. On September 10, 1992, the Federal Deposit Insurance Corporation (hereinafter, the "FDIC"), as Receiver of the assets of Riverhead Savings Bank (hereinafter "Riverhead") and American Savings Bank (hereinafter "American"), removed the action to the United States District Court for the Eastern District of New York.

This action arose in response to certain acts of Riverhead and American, taken nearly four years prior to the commencement of the FDIC's Receivership, which acts had the effect of destroying the petitioners' businesses and bringing about their financial ruin.

The petitioners' claims arose out of two sets of allegedly wrongful acts by Riverhead:

(1) Wrongful Acceleration and Set-Off - On October 21, 1988, Riverhead accelerated all of the petitioners' outstanding loans and set off, from their bank accounts, a total of $512,308.14 in order to repay itself the full amounts of principal and interest

due on those loans and on eight "recourse" customer loans, whether or not those loans were in default.

(2) Wrongful Dishonor of Checks - From approximately October 17, 1988 forward, Riverhead failed to honor at least 14 checks drawn by the petitioners, 11 of which were made payable to the order of their "floor plan financing" bank, in various amounts between $16,260 and $70,678, totalling over $400,000, which resulted in the petitioners' losing their floor plan financing, and consequently being left unable to replace such financing, a virtual necessity in the operation of their motor vehicle dealerships.[1]

Petitioners claimed that either or both of these sets of wrongful acts directly and proximately caused them to be forced out of business, at a cost of millions of dollars in lost assets and in present and future profits.

An appeal was made from a judgment entered after a jury trial upon which the jury rendered a verdict against the petitioners on both of the above claims.

The issues on this Petition relate to the refusal of the Court of Appeals to reverse the District Court's legal rulings, made during the trial, which the petitioners contend improperly excluded from evidence the most significant documentary evidence — two agreements known as "Automatic Charge Authorizations" — and other critical evidence.

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[1] An auto dealership must have so-called "floor plan financing" in order to be able to maintain a sufficient inventory of vehicles at its premises without having to pay the manufacturers in cash "up front", which would require an enormous (multi-million dollar) cash outlay.

The Banking Relationship Between The Petitioners and Riverhead

There were three basic aspects to the petitioners' banking relationship with Riverhead: (1) maintenance of operating checking accounts, (2) "direct" loans, and (3) "recourse" consumer loans.

1. Checking accounts - For many months prior to October 21, 1988, petitioners maintained their operating bank accounts at Riverhead.

2. Direct Loans - As of October 1988, petitioners had taken, and had outstanding, eight loans of various types from Riverhead. Each of these loans had been taken or renewed, from time to time, with the approval of Riverhead's Loan Committee. While each of these loans was taken either by Lake Imports, Inc., or by Smithtown Imported Cars, Inc., all of the loans were personally guaranteed by Gurdon and secured by all of the petitioners' assets, and all were "cross-guaranteed" by all of the other petitioner corporations, so that all petitioners were guarantors on all loans made to any one petitioner.[2]

In the loan documents and guarantee documents, petitioners gave Riverhead the right to set off against any moneys on account at Riverhead in the event of any default. This right of set-off, with the cross-guarantees (and together with the Automatic Charge Authorizations, described hereinbelow), effectively and

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[2] As a result, as they relate to most issues on this petition, there is little significance as to which corporation had been obligated as to any one particular loan. Thus, for most purposes in this Petition, the petitioner corporations will be referred to collectively.

actually gave Riverhead the right to pay itself any amount which came due on any loan made to any one of the petitioner corporations, from funds on account with that, as well as any other, petitioner corporation. Some of these loan documents also gave Riverhead the right to accelerate the loans if it found the borrower's ability to repay to be impaired.[3]

3. "Recourse" Consumer Loans - Riverhead was the financing bank for many consumer loans for petitioners' customers' purchasing or leasing of vehicles. In some instances (e.g., where the customer's credit standing was not completely satisfactory), Riverhead would only agree to make the loan to the customer if the petitioner guaranteed the loan through the mechanism of a recourse agreement.

Automatic Charge Authorizations

In addition to the protection given to Riverhead by the loan and guarantee documents, the petitioner corporations executed, at Riverhead's request, Automatic Charge Authorizations, the effect of which was to allow Riverhead to pay itself any amount of principal or interest due on any loan when due. They did so at the specific request of the loan officer in charge of petitioners' accounts at Riverhead, who had been authorized by Riverhead's Loan Committee to elicit these authorizations from these two corporate borrowers.

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[3] New York Uniform Commercial Code, Section 1-208 automatically implied in these clauses a good faith belief on the part of Riverhead in the borrower's said financial insecurity.

The document was a Riverhead Savings Bank form, prepared by the Bank, on its own letterhead, and neither bore, nor had a place for, a signature on behalf of the bank.

Although Riverhead never physically placed its signature on these documents, its Loan Committee had approved them, and Riverhead began to carry them out almost immediately after their execution, systematically paying itself principal and interest payments on the various loans by automatically deducting the due amounts from petitioners' checking accounts on their due dates without petitioners' having had to write and deliver checks for these payments, as they had routinely done prior to signing the Automatic Charge Authorizations.

The Automatic Charge Authorizations were the most significant documents in the case. They, taken together with the loan documents and cross-guarantees, made it, effectively, impossible for petitioners to be in default of payment on any loans as long as they maintained sufficient balances in their accounts, collectively, to cover any due amount (which they did).

As a result of the documents, the petitioners' financial ability to repay these loans was firmly established.

Riverhead's Wrongful Acceleration and Set-Off

On October 21, 1988, without notice, Riverhead unilaterally accelerated eight direct loans (four from Lake Imports, Inc. and four from Smithtown Imported Cars, Inc.), and forced those petitioners to purchase eight recourse consumer loans. It then set off from

those petitioners' checking accounts a total of $512,-308.14.[4] Although this left the sum of $297,365.81 in those two petitioners' accounts,[5] Riverhead had failed to honor even the smallest one of eleven (11) checks written by the petitioners to its floor plan financing bank, in various amounts between approximately $16,260 and $70,678, both before and after the set-off on October 21, 1988. Simultaneously, it delivered two letters to the petitioners stating that it had so set off those funds.

As a result of Riverhead's failure to pay those checks, the petitioners were deemed to be in what is known as an "out of trust" (default) position with their floor plan financing bank, lost their floor plan financing, and were unable to procure replacement financing. This ultimately led directly to the complete destruction of petitioners' businesses, inasmuch as they could not operate without such financing, and their failure to have floor plan financing in place caused the cancellation of their franchise agreements.[6]

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[4] This consisted of $213,817.46 from Smithtown Imported Cars, Inc., and $298,490.68 from Lake Imports, Inc.

[5] This consisted of $146,142.29 in Smithtown Imported Cars, Inc.'s accounts, and $151,223.62 in Lake Imports, Inc.'s accounts.

[6] As a result of the findings of the jury, predicated, we believe, upon errors in the rulings and instructions of the Trial Court, the issues of proximate cause and damages were never reached below, and are not issues on this petition. These general facts are stated here merely so as to give this Court a comprehensive background of the facts of the case.

The petitioners commenced this action in July 1989 against Riverhead, American, and Anthony J. Sisti, then vice-president of Riverhead. The action was subsequently discontinued against Sisti.

On or about June 12, 1992, the FDIC was appointed Receiver of American Savings Bank and Riverhead Savings Bank. As a result, the FDIC became the defendant in this action in that capacity. On September 10, 1992, this action was removed to the District Court pursuant to the provisions of 28 U.S.C. § 1446.

After having sought no discovery from the time of removal, on August 16, 1993, respondent FDIC served a Notice of Motion for Summary Judgment. It sought summary judgment on the ground that there was no question of fact that these loans were in default, and that petitioners could offer no evidence to refute this contention under the so-called "D'Oench" statute, 12 U.S.C. § 1823(e).

After hearing oral argument, the District Court denied the motion for summary judgment.

The District Court denied the respondent's application for reargument.

Undaunted, the respondent made a third motion for summary relief based upon 12 U.S.C. § 1823(e), in the form of a motion in limine to preclude the petitioners from offering any evidence of any course of dealing between them and Riverhead. This motion, too, was denied.

As a result of these pre-trial rulings, the petitioners offered (and the trial court admitted) into evidence the Automatic Charge Authorizations. The petitioners then premised a substantial part of their case upon these documents and upon testimony concerning the

circumstances, purposes, utilization and effects of these Automatic Charge Authorizations. They relied heavily upon this evidence, not only to refute the allegations of loan defaults,[7] but also to establish that Riverhead Savings Bank could not have had a good faith belief in the financial insecurity of the petitioners to repay their loans.[8]

However, the trial court, ultimately, would preclude such evidence at trial. What made this even more prejudicial to the petitioners was that the trial court had first admitted such evidence — including the Automatic Charge Authorizations — there having been no objection thereto by the respondent, allowing the jury to see and consider them, and then later — deep

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[7] Specifically, since Riverhead had had the right to deduct, and had been routinely deducting, loan payments directly from the petitioners' bank accounts when due, the petitioners claimed that they could not be found in default of a loan obligation merely because Riverhead chose, without notifying petitioners, to refrain from taking the payment from the bank account, when there were more than sufficient funds available to cover the payments when due.

[8] This was the alternate ground upon which the respondent had attempted, at trial, to justify Riverhead Savings Bank's acceleration and set-off. It was also the issue upon which they ultimately prevailed, and based upon which the Court of Appeals found it unnecessary to reach the D'Oench issue.

Because petitioners contended that the alternate issue should not have been resolved "in a vacuum", and that the exclusion of evidence under the "D'Oench" statute (12 U.S.C. § 1823[e]) prejudiced petitioners' ability to prove the elements of their case to the jury on that alternate issue, we dispute the Court of Appeals' holding that the D'Oench issue is moot, and ask this Court to address and decide the D'Oench issue.

into the trial — ruled, and affirmatively instructed the jury, that the Automatic Charge Authorizations were out of the case.[9]

The Trial Court's Erroneous Application of 12 U.S.C. § 1823(e)

In excluding the Automatic Charge Authorizations, after having allowed their admission into evidence, although the District Court made reference in its charge to the jury to the common law "D'Oench" doctrine (emanating from this Court's ruling in D'Oench Duhme & Co., Inc. v. FDIC, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956, rehearing denied, 315 U.S. 830, 62 S.Ct. 910, 86 L.Ed. 1224 [1942]), it appears to have excluded the Automatic Charge Authorizations specifically under the statutory "D'Oench" doctrine, 12 U.S.C. § 1823(e), having read the four requirements of that statute verbatim to the jury, and having expressly relied upon that statute in its charge.

The jury rendered a verdict against the petitioners on the issue of the loan defaults, which was predicated directly upon the District Court's charge on the statutory D'Oench doctrine (12 U.S.C. § 1823[e]). In its charge, the District Court expressly instructed the jury that they were not to consider that Automatic Charge Authorizations, and that they were "out of the

[9] The contention that this scenario did affect the jury's consideration of the case is borne out by the jury's first question to the Court during their deliberations: "Why was the Automatic Debit Agreement [sic] taken out?"

case",[10] not only vis-à-vis the D'Oench issue, but for

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[10] The District Court, although excluding the Automatic Charge Authorizations under 12 U.S.C. § 1823(e), did not prevent the jury from considering these documents merely on the "loan default" issue to which that statute was applied by the Court, but also on the "financial security" issue.

Ultimately, this is what has placed the petitioners in the predicament they now present to this Court. They have been prejudiced by an egregious error of law at trial, which:

- completely negated their ability to prevail before the jury on the first of two issues presented; and
- substantially affected their ability to prevail before the jury on the second of those two issues presented.

Then, the Court of Appeals ruled that it did not need to reach the issue of whether the District Court committed the egregious error vis-à-vis the first issue, because, it held, the petitioner had been unsuccessful before the jury on the second issue.

The Circuit Court, in so holding, completely disregarded the adverse effect of the exclusion from evidence of the Automatic Charge Authorizations on the petitioners' ability to have persuaded the jury in its favor on the second issue.

As was argued to the Court of Appeals on the petition for rehearing, the exclusion from evidence of the Automatic Charge Authorizations was particularly prejudicial in that the District Court removed them from evidence, well into the trial, after having:

(i) denied — three times — the respondent's motions for summary judgment based upon the D'Oench doctrine;

(ii) admitted the Automatic Charge Authorizations into evidence at or near the very outset of the petitioners' case; and

(iii) allowed the petitioners to premise a substantial part of their case before the jury upon the Automatic Charge Authorizations as a foundation.

(continued...)

all purposes which, naturally, included the "financial irresponsibility" issue — the issue which was ultimately the petitioners' undoing in this case.

The jury rendered a verdict against petitioners on this issue as well.

REASONS FOR ALLOWANCE OF THE WRIT

As described below, we ask this Court to grant certiorari in this case in order to accomplish for the area of law known as the "D'Oench doctrines" (statutory and common law) precisely what this Court accomplished ten years ago for the area of law known as "RICO" in Sedima v. Imrex, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed. 2d 346 (1985): clarifying an area of law, arising hundreds of time per year, as to which there is no unifying set of guidelines for its applications.[11]

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[10](...continued)

The obvious result is that when, deep into the trial, the District Court reversed itself, and excluded the Automatic Charge Authorizations, and expressly instructed the jurors that they may not consider them, the jury must have questioned not only the financial viability of the petitioners, but the credibility of the petitioners, having relied so heavily upon these Automatic Charge Authorizations throughout the trial, and then having the District Judge so discard them as valueless.

[11] The only occasion upon which this Court addressed the D'Oench doctrines (after D'Oench Duhme & Co., Inc. v. FDIC, supra, was in ruling on Langley v. FDIC, 484 U.S 86, 108 S.Ct. 396, 98 L.Ed.2d 340 [1987]). There, this Court granted certiorari to decide a specific question on which two Circuit Courts of Appeals contradicted one another.

(continued...)

The Law's Current State of Disarray and Conflict

The writ sought herein should be allowed because the "D'Oench" doctrines — both the statutory and common law doctrines — are, to state it quite candidly, in a state of disarray and confusion, not only as among the Circuit Courts of Appeals, but particularly among the District Courts.

Because cases are tried — or decided summarily — at the District Court level, it would be in the interest not only of consistency in the law, but of judicial economy as well, for the District Courts to have a set of guidelines from this Court to follow on the applications of the statutory and common law D'Oench doctrines, because this would likely negate many appeals otherwise made largely because of the fact that virtually any decision of a District Court either in favor of, or against, the FDIC (or the Resolution Trust Corp., etc., as the case may be) becomes, as a practical matter, a legitimate candidate for appeal. With the plethora of conflicting and confusing applications and refusals to apply the common law and/or statutory D'Oench doctrines, one can find case law to support of both sides of almost any D'Oench issue.

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[11](...continued)

While this Court also gave an analysis of the D'Oench doctrines, we respectfully submit that it did not analyze and reconcile the statutory and common law D'Oench doctrines to the degree necessary today, as can be seen by the hundreds of inconsistent decisions which have been written by District and Circuit Courts in the past eight years.

As far as this Court went in Langley, — which may be as far as it needed to go at that time — the time has now come that the bench and bar sorely need further guidance.

In this regard, witness the case of FDIC v. Meo, 505 F.2d 790 (9th Cir. 1974), which, after all of the D'Oench history has been analyzed, has been called the "completely innocent exception" to the D'Oench doctrines, see In re NBW Commercial Paper Litigation, 826 F. Supp. 1448, 1462 n. 19. Nevertheless there is case law which states that the party seeking to overcome the D'Oench doctrines need not have intended to mislead or deceive banking authorities, and yet can still be victimized and bound by the D'Oench doctrines.

FDIC v. Meo, however, has been challenged as an exception which is no longer viable. See, e.g., FSLIC v. Gordy, 928 F.2d 1558, 1567 n. 14 (11th Cir. 1991), finding the "completely innocent exception" of Meo to be "based on an outdated understanding of D'Oench" in light of this Court's 1987 decision in Langley, supra. It has thus become typical that any party citing Meo, for example, as precedent will likely be confronted with a countervailing, equally colorable Circuit Court holding, thereby falling victim to the vagaries of the decisional chaos which has come to plague the D'Oench doctrines.

Even within a given circuit, the various District Courts seem to wander off on "frolics of their own" in interpreting and implementing the D'Oench doctrines, not only failing to analyze either the common law or statutory doctrines with any degree of consistency, but frequently failing to distinguish between them. Thus in disharmony, they have left in their wake not serviceable teachings such as the law prefers, but a peripatetic amalgam of rulings inconsistent at best, and mutually contradictory at worst, together with,

arguably, the temptation to "precedent-shop", if not to forum-shop.[12]

For example, some courts have called the statute a codification of the case law doctrine, which would mean that the former supersedes the latter, in that Congress, by enacting the statute, thus replacing existing common law, obviated the need for new common law pronouncements, see Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 97-98, 101 S.Ct. 1571, 1583-84, 67 L.Ed. 2d 750, 766-68 (1981). Other courts have suggested that the statute is a "partial" codification of the common law doctrine, see, e.g., Avirez, Ltd. v. Resolution Trust Corp., 876 F. Supp. 1135, 1139 (C.D. Cal. 1995), meaning that it fills in certain gaps left by the common law doctrine, which would, in turn, mean that they co-exist, such that the two may co-exist to the extent that either or both may apply to the same case. In In Re NBW Commercial Paper Litigation, supra, the court, reviewing the history and evolution of the two doctrines, noted that

> [o]ver the years, case law surrounding [common law] D'Oench and the statute (particularly § 1823[e]) has cross-pollinated such that it is very

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[12] We refrain, at this petitioning stage, from reviewing and recounting the legislative history which underpins Section 1823(e), being reluctant to expound prematurely on the merits, or lack of them, of its application to the case at bar. We confine ourselves here to argument as to why the now unrestrained and disorderly invocations of the statutory provision and the common law D'Oench doctrine, sometimes "in tandem", and sometimes not, have left the law so unsettled as to make the case at bar ripe for review in this Court.

difficult to decide where the statute ends and D'Oench begins.

Id. at 1457, citing Royal Bank of Canada v. FDIC, 733 F. Supp. 1091, 1095 (N.D. Tex. 1990), which purported to describe how the statutory and common law doctrines are integrated "in tandem", but actually effectively vitiated any distinctions between the two by construing them pari rationæ, or at least opining that the lines of case law had done so. Id.

With all these ad hoc opinions, no appellate court has yet definitively placed the statutory and common law D'Oench doctrines into perspective, individually, let alone vis-à-vis each other.[13]

One aforementioned court tried, rendering a superb analysis in both form and substance; it was, however, a District Court, whose rulings are not binding upon

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[13] NBW itself cites to various "one-line" analyses of the relationship between the statutory and common law doctrines, id. at 1458, including:

- Section 1823(e) is the "statutory analogue" of D'Oench, citing FDIC v. Bertling, 751 F. Supp. 1235, 1247, n. 1 (E.D. Tex. 1990);
- Section 1823(e) "codified" D'Oench, citing Bowen v. FDIC, 915 F.2d 1013, 1015, n. 3 (5th Cir. 1991);
- common law D'Oench "retains some independent vitality", even after enactment of the statute, citing Reding v. FDIC, 942 F.2d 1254, 1259 (8th Cir. 1991), and FDIC v. Orrill, 771 F. Supp. 777 (E.D. La. 1991); and
- the "ever popular" (now-platitudinous) holding that Section 1823(e) is a "partial codification of D'Oench", citing, as examples, Tuxedo Beach Club Corp. v. City Federal Savings Bank, 749 F. Supp. 635, 641 (D.N.J. 1990).

other District Courts in other Circuits. See our references to In Re NBW Commercial Paper Litigation, supra and infra.

In that case, Judge Lamberth reviewed conflicting analyses by the various courts which had attempted to rewrite the statutory and common law doctrines, but found that "[c]ourts have routinely concluded that both would apply, and thus have found no need to distinguish the two," citing Resolution Trust Corp. v. Murray, 935 F.2d 89 (5th Cir. 1991). In that case, the court first listed and compared five ("one-line") case law analyses of the relationship between the two doctrines, and then found a rationale to avoid resolving the controversy, because, it held, both doctrines applied to that case:

> There has been much discussion on the issue of whether § 1823(e) truly codifies the D'Oench, Duhme doctrine, is more limited, or goes further. Compare, e.g., FDIC v. Wood, 758 F.2d 156, 159 (6th Dir. 1985) (D'Oench "generally considered" to have been codified in § 1823[e]) and Bowen v. FDIC, 915 F.2d 1013, 1015 n. 3 ("essentially a codification") with FDIC v. O'Neil, 809 F.2d 350, 353 (7th Cir. 1987) (attempted codification overshot the mark) and Hartigan v. Commonwealth Mortgage Corp. of America, 723 F. Supp. 1258, 1261 (N.D. Ill. 1989) ("the D'Oench doctrine sweeps more broadly than Section 1823[e]"). See also, Kilpatrick v. Riddle, 907 F.2d 1523, 1529 n. 2 (5th Cir. 1990) (Brown, J., dissenting) (§ 1823[e] much more specific than D'Oench, Duhme); Note, Borrower Beware: D'Oench, Duhme and Section 1823 Overprotect the Insurer When Banks Fail, 62

> S.Cal.L.Rev. 253, 271-73 (1988). Since both D'Oench, Duhme and § 1823(e) apply to the instant case, we need not resolve this controversy.

Id. at 93, n. 3.

Unfortunately, too many courts have so "routinely concluded that both [doctrines] would apply", NBW, supra, at 1458, and then freely interchanged the criteria and elements of the two, erroneously applying the inapplicable one where only the other was applicable.

NBW ultimately held that the statute was not intended to "pre-empt" the common law doctrine, but that the two were "capable of somewhat independent interpretations . . . so that they do not completely overlap", id. at 1460. The court so holding then analyzed the statutory and common law doctrines separately — each in great detail, something which very few [other] courts — the lower courts in the case at bar not among them — have ever done at all, let alone done diligently.

Not insignificantly, the FDIC itself suffers from — and causes — much of this confusion, frequently interchanging the statutory and common law doctrines freely, which, quite naturally, induces District Judges to fall into the same trap. Even in this case, in which the District Judge charged the jury on the D'Oench statute, literally quoting the four strict requirements which the jury had to find, from the statute, verbatim, the District Judge nevertheless, in explaining the concept, utilized language from the common law doctrine, even to the extent of citing to the case of D'Oench Duhme & Co., Inc. v. FDIC, 315 U.S. 447,

62 S.Ct. 676, 86 L.Ed. 956, rehearing denied, 315 U.S. 830, 62 S.Ct. 910, 86 L.Ed. 1224 (1942), the decision of this Court from which the common law doctrine had emanated, some eight years before the statute was enacted.

In addition, on the petitioners' appeal to the Second Circuit in this case, the respondent FDIC, in trying to justify the District Court's application of 12 U.S.C. § 1823(e), the statutory D'Oench doctrine, relied heavily upon two "leading" D'Oench cases: Bowen v. FDIC, 915 F.2d 1012 (5th Cir. 1990), and Beighley v. FDIC, 868 F.2d 776 (5th Cir. 1989), yet these cases were both decided under the common law D'Oench doctrine.[14]

On the particular issue raised in the case at bar, five Circuit Courts of Appeals had ruled that the "asset requirement" is a prerequisite to the implementation of the "D'Oench" statute — no Circuit Courts had ruled otherwise — yet the District Court disregarded the "unanimous" holding of these five circuits, never actually giving its rationale for doing so, even after having elicited trial memoranda and some oral argument on the issue.

Because the petitioners' financial viability was a significant part of the "financial irresponsibility" issue upon which the FDIC ultimately prevailed, the Second Circuit Court of Appeals was simply wrong in finding that the D'Oench issue was moot, in view of the jury's

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[14] In fact, in Beighley, supra, the Court of Appeals reversed the lower court's grant of summary judgment under Section 1823(e) which had been based on plaintiff's inability to meet that statute's strict writing requirements.

finding against petitioners on the financial irresponsibility issue.[15] It was the direct effect of the District Court's erroneous application of the D'Oench statute which seriously influenced the jury on this issue, predisposing the jury against the petitioners, who had premised so much of their argument on their financial stability on the bank's rights under the Automatic Charge Authorizations, only to have the District Court tell the jury, "at the twelfth hour" (in the trial court's charge to the jury), that they were not to consider the Automatic Charge Authorizations in their deliberations.

Reconciling the Law by Distinguishing the Misleading from the Innocuous

In addition to our arguments that the issue of law upon which we ask this Court to grant certiorari has important public significance, this is a case in which it is particularly appropriate for the Court to do so. There are significant facts and circumstances in this case which are analogous to those in recent Circuit Court decisions which have found in favor of parties seeking to avoid application of the D'Oench doctrines.

In particular, the D.C. Circuit recently reversed a summary judgment granted to the FDIC by the District Court, and held that a party who had entered into an escrow arrangement with a bank was not precluded by either the common law or statutory D'Oench doctrines from showing that the escrow agreement

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[15] While the Second Circuit Court of Appeals reaffirmed what we believe to have been an egregious error in denying petitioners' Petition for Rehearing, it rendered no substantive decision in doing so.

had been extended by the conduct of the parties. E.I. du Pont de Nemours & Co. v. FDIC, 32 F.3d 592 (D.C. Cir. 1994), rehearing denied, 45 F.3d 458 (D.C. Cir. 1995).

In the case at bar, similarly, petitioners should have been allowed, in spite of D'Oench, to show the agreement which was based upon the Automatic Charge Authorizations and the conduct of the Riverhead Savings Bank. The District Court, however, expressly excluded such evidence under 12 U.S.C. § 1823(e).

While the original decision of the D.C. Circuit Court of Appeals gave a detailed analysis of the D'Oench doctrines, the decision denying the rehearing gave a firm, if concise, refutation of the three primary arguments raised by the FDIC as to why the plaintiff should not have been allowed to avoid the D'oench doctrines. In doing so, that court focused upon the scope and purposes of the D'Oench doctrines, citing Langley, supra, and showed reasons why it would be inappropriate to impose the D'Oench restrictions upon the plaintiff when the circumstances of its claim:

(1) were not, conceptually, the target of D'Oench;

(2) if denied, would not serve the purposes of D'Oench; and

(3) if allowed, would not frustrate the primary purpose of D'Oench, which is to avoid the possibility of misleading bank regulators and auditors.

Id., 45 F.3d at 458-60.

Specifically, in E.I. du Pont, the court found that the failure to record a document would not implement

D'Oench where an insurer, examiner or liquidator would not have deemed the institution any less secure if the document had been recorded.

This is, very simply, precisely the circumstance in the case at bar. No one has contended, or could contend, that if the FDIC examiners were aware of the Automatic Charge Authorizations (whether through recording under the strict requirements of 12 U.S.C. § 1823 or otherwise), they would have deemed Riverhead any less secure — even if the examiners had reviewed the bank's records in 1988, when the loans were still outstanding, let alone when they did review them, more than three years after all of the petitioners' loans from had been fully repaid to the bank. Therefore, as in E.I. du Pont, D'Oench should not have been a bar to the petitioners herein. In fact, the court in E.I. du Pont, after citing Langley, supra, to show the policy behind D'Oench, not only so held, but stated that it was

> aware of no court, however, having held that a failure to record prohibits recovery under D'-Oench where the court has also concluded that a regulator was not, or was not likely to be, misled by the arrangement. We have neither a warrant nor the inclination to expand the federal common law D'Oench doctrine to a case where no insurer, examiner or liquidator would have deemed an institution any less secure had the . . . agreement in question been extended in writing rather than by practice.

E.I. du Pont, 45 F.3d at 459.

Again, in the case at bar, the Automatic Charge Authorizations simply cannot be said to be likely to mislead anyone.

The import of the holding in E.I. du Pont is that if, and only if, disclosure of the Automatic Charge Authorizations in the manner contemplated by 12 U.S.C. § 1823(e) could have made a difference in the FDIC's evaluation of the assets of Riverhead Savings Bank, would D'Oench be applicable to preclude evidence of such an agreement or arrangement. In this case, knowledge of the Automatic Charge Authorizations would not have changed the FDIC's valuation of the assets of Riverhead Savings Bank by even one dollar.[16]

E.I. du Pont, supra, has "blazed new territory" in subscribing to a practical application of the D'Oench doctrines, one which is perfectly consistent with this Court's decision in Langley, yet not in any way inconsistent with this Court's original decision in D'Oench Duhme & Co. v. FDIC, supra.

However, if this Court does not take this opportunity to clarify this issue, this will remain an unresolved

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[16] This would have been true, even if the FDIC had examined the bank's assets while the loans were outstanding, prior to October 21, 1988. A fortiori, it would certainly have been true in the weeks or months preceding the receivership date of June 1992, the time period during which the FDIC's regulators would have been examining and evaluating the bank's assets.

It is illogical to believe that at that point, nearly four years after the loans had been fully repaid, the Automatic Charge Authorizations had any effect at all on such examinations, let alone any tendency to mislead the examiners as to any asset of the bank's.

issue; numerous litigants will point to E.I. du Pont, supra, to try to avoid the broad application of D'Oench, and numerous District Courts will continue to disregard the authority of E.I. du Pont — as will the FDIC — by relying on general principles of the many other Circuit Court decisions, eventually inducing some courts in other circuits to characterize E.I. du Pont, supra, as another "Meo"; another exception which will, by erosion, lose its vitality if not given a "seal of approval", for all to follow, by this Court.

We therefore respectfully call upon this Court to take the opportunity now to pronounce that recent case law such as E.I. du Pont, supra, either is, or is not, valid precedent.

If it is valid, then petitioners herein are most certainly entitled to a reversal of rulings of the lower courts in this case. Whether it is or is not valid, the bar needs to have some degree of certainty on the state of the law of D'Oench — a certainty which only this Court can provide.

CONCLUSION

In sum, we respectfully ask this Court to take the opportunity to utilize this case to do for the D'Oench (statutory and common law) doctrines what it did for the RICO statutes and case law in Sedima v. Imrex, supra: to give the various Circuit and District Courts a set of guidelines which will create some consistency in defining and implementing, as well as reconciling, to the extent required, the common law and statutory D'Oench doctrines.

Stated in this Court's own language, the reason that this petition for certiorari should be granted here is the same as it found in Sedima:

> The decision below was one episode in a recent proliferation of civil RICO litigation with the Second Circuit and in other Courts of Appeals. In light of the variety of approaches taken by the lower courts and the importance of the issues, we grant certiorari.

473 U.S. at 486, 105 S.Ct. at 3279-80, 87 L.Ed. 2d at 352 (footnotes omitted).

We have referred this Court to the decision of Judge Lamberth in In Re NBW Commercial Paper Litigation, 826 F.2d 1448 (D.D.C. 1993). This is one of the few decisions — if not the only one — which analyzes, explains the history and evolution of, and reconciles the statutory and common law D'Oench doctrines. This is the type of informative and instructive decision which the bench and bar need from this Court, to clarify the state of these doctrines. As fine an analysis — comprehensive and clear — as the NBW Commercial Paper decision was, it is not binding on other Circuit Courts of Appeals or the District Courts therein. A similar analysis by this Court, of course, would be binding.

While we may agree with much of the analysis of Judge Lamberth in NBW Commercial Paper, supra, and while we might urge this Court to reach similar conclusions should this Court grant certiorari, and give us an opportunity to argue these issues, it is this type of analysis — regardless of the ultimate substance, and regardless of whether or not this Court actually agrees with the decision of Judge Lamberth — which is sorely needed by the bench and bar from this Court on this subject.

In fact, we respectfully submit that respondent FDIC, although successful to this point in this case, is as much in need as any other person or entity of a statement by this Court of the state of the statutory and common law D'Oench doctrines, so that it may be guided accordingly in its proceedings, and perhaps avoid unnecessary appeals, resulting from continued inconsistent District Court decisions in the multitude of actions brought by and against the FDIC and the Resolution Trust Corporation in which the D'Oench doctrines become the determinative issues of law.

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the 9th day of January , one thousand nine hundred and ninety-five.

PRESENT:

HON. FRANK X. ALTIMARI,
HON. PIERRE N. LEVAL,
HON. GUIDO CALABRESI,
Circuit Judges.

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LESLIE GURDON; LAKE IMPORTS, INC.; SMITHTOWN IMPORTED CARS, INCORPORATED; L&L CYCLES, LTD; and LAKE CYCLES, LTD.,

Plaintiffs-Appellants,

-v- Docket No: 94 - 6054

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of Riverhead Savings Bank, FSB and American Savings Bank, FSB,

Defendant-Appellee.

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This cause came to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is hereby ordered, adjudged, and decreed that the judgment of the district court be and it
hereby is AFFIRMED.

Plaintiffs-appellants Leslie Gurdon, Lake Imports, Inc., Smithtown Imported Cars, Inc., L&L Cycles, Ltd. and Lake Cycles, Ltd. (collectively "the Borrowers") brought suit in state court against defendant-appellee Riverhead Savings Bank and American savings Bank ("the Bank" or "Riverhead"). In 1992, defendant-appellee the Federal Deposit Insurance Corporation ("FDIC") was appointed receiver of the two defendant banks; shortly thereafter it substituted itself for the defendant Bank and removed the case to federal court.

The Borrowers alleged that Riverhead had wrongfully dishonored checks, and had wrongfully set off their accounts against debts owed to Riverhead. A jury found in favor of defendant. The Borrowers appeal several evidentiary rulings and challenge the jury instructions. We affirm.

Beginning in 1986, the Borrowers entered into several loan agreements with the Bank. They had six direct loans with the Bank, documented by eight Notes. The Borrowers also had eight recourse loans with the Bank. Each loan contained numerous events of default including payments owed, the lender's financial insecuri-

ty and the borrower's financial condition to the extent it impaired the lender's security or increased its risk. A default under any of the Notes entitled the Bank to accelerate and set off the Borrowers' accounts against all of the loans. Neither notice nor demand was required under the terms of the Notes.

In October 1988, the Bank set off the Borrowers' deposit accounts against their outstanding loan balances of just over $500,000. It did so with neither notice nor demand. Within a few days of the set-off, the Bank also dishonored several of the Borrowers' checks even though, according to the Borrowers, they had sufficient funds to cover at least some of the drafts. In addition, the Bank compelled the Borrowers to pay the eight recourse consumer loans on which they were signatories.

Stockholder and president Gurdon had executed a guarantee of the Borrowers' debt. He had also executed an automatic charge authorization ("ACA") which permitted the Bank to deduct monthly payments from the Borrowers' deposit accounts to pay interest owed on the loans.

Before trial the district court denied motions by both sides to preclude certain evidence. The Borrowers were thus permitted to show the Bank's course of dealing with the dealerships and the Bank was permitted to show that it had a good faith belief that it was financially insecure; it also put on evidence of the Borrowers' fiscal irresponsibility, another default event. At trial, the court reversed itself, on the ground that the D'Oench Duhme doctrine barred the Borrowers from showing a

course of conduct with respect to the ACAs. See D'-Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942).

The Bank did not plead its own financial insecurity or the Borrowers' financial irresponsibility in its answer, except to the extent that it made general denials of the Borrowers' averments to the contrary. The Bank made these arguments for the first time in its reply papers on its own unsuccessful motion for summary judgment. In prior pleadings, and in communications with the Borrowers, the Bank had explained that it was accelerating and setting off because certain loans were in default. on the pretrial motion for summary judgment, the Bank urged that it need not show late payment on any loans because its financial insecurity was sufficient justification for invoking default even if it was not the reason it gave at the time of the set-off. The district court denied the motion. The Borrowers contend that it was error 1) to bar the ACAs and other proof of a course of conduct; and 2) to allow evidence as to any default event except the initially-stated reason, that notes were overdue.

The district court properly admitted evidence tending to show that other events of default existed. We decline to hold that the Bank waived its own financial insecurity as a justification for its actions. The "mend the hold" doctrine, which prevents a party from concocting an illegitimate defense "and then when that defense fails (at some expense to the other party) tr[ying] on another defense for size . . . .," Harbor Ins. Co. v. Continental Bank Corp., 922 F.2d 357, 362 (7th Cir. 1990), simply does not apply.

The verdict sheet indicates that, among other things, the jury rejected the Borrowers' contention that the Bank could not reasonably deem itself to be financially insecure. We will not disturb the jury's finding. The Borrowers' president, Leslie Gurdon, testified that he was informed by a bank official that "badgering" phone calls from another lender had caused the Bank to feel insecure, prompting the set-off. The Bank's good faith belief that it was financially insecure was a condition of default under the terms of the interlocking notes. Because we find that the Bank properly established a different event of default, we do not reach the D'Oench Duhme issue.

We have reviewed the Borrowers' other arguments and find them to be without merit. The judgment of the district court is AFFIRMED.

S/_____
HON. FRANK X. ALTIMARI,

S/_____
HON. PIERRE N. LEVAL, by F.X.A.

S/_____
HON. GUIDO CALABRESI, by F.X.A.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN THE UNRELATED CASES BEFORE THIS OR ANY OTHER COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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LESLIE GURDON, LAKE IMPORTS, INC., SMITHTOWN IMPORTED CARS, INC., L & L CYCLES, LTD. and LAKE CYCLES, LTD.,

Plaintiffs,

v.

(ADS)
FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver of RIVERHEAD SAVINGS BANK, FSB and AMERICAN SAVINGS BANK, FSB,

Defendant.

----------X

JUDGMENT IN A CIVIL CASE

Case No. CV-92-4328

[X] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict in favor of the defendant and against the plaintiffs on January 10, 1994.

IT IS ORDERED AND ADJUDGED, that judgment is entered in favor of the defendant FEDERAL

DEPOSIT INSURANCE CORPORATION as Receiver for the RIVERHEAD SAVINGS BANK, FSB, and AMERICAN SAVINGS BANK, FSB, and against the plaintiffs, LESLIE GURDON, LAKE IMPORTS, INC., SMITHTOWN IMPORTED CARS, INC., L & L CYCLES, LTD., dismissing the complaint.

JANUARY 10, 1994 ROBERT C. HEINEMANN

Date

Clerk

S/

By Deputy Clerk
Kenneth J. Zuniga

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

LESLIE GURDON; LAKE IMPORTS, INC.; SMITHTOWN IMPORTED CARS, INCORPORATED; L&L CYCLES, LTD; and LAKE CYCLES, LTD.

Plaintiffs,

ORDER

- against -

CV-92-4328 (ADS)

RIVERHEAD SAVINGS BANK, FSB, ANTHONY J. SISTI and AMERICAN SAVINGS BANK, FSB,

Defendants.

----------X

APPEARANCES:

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Of Counsel

SPATT, District Judge.

The Federal Deposit Insurance Corporation ("FDIC") in its capacity as Receiver of Riverhead Savings Bank and American Savings Bank, moves pursuant to Fed. R. Civ. P. 56 for summary judgment, dismissing the complaint, on the ground that the plaintiffs' claims are specifically precluded by 12 U.S.C. § 1823(e) which operates as an absolute bar to any claims against the FDIC that an oral agreement or course of conduct has modified the clear language of a written agreement.

The Court having reviewed the papers submitted by both parties, and having heard oral argument of the motion on September 24, 1993, and for the reasons stated in the record during oral argument, it is hereby

ORDERED, that the motion by counsel for the defendants, pursuant to Fed. R. Civ. P. 56, for summary judgment dismissing the complaint is denied.

SO ORDERED.

Dated: Uniondale, New York
September 24, 1993

/s/

ARTHUR D. SPATT
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

LESLIE GURDON; LAKE IMPORTS, INC.; SMITHTOWN IMPORTED CARS, INCORPORATED; L&L CYCLES, LTD; and LAKE CYCLES, LTD.

Plaintiffs,

ORDER

- against -

CV-92-4328 (ADS)

RIVERHEAD SAVINGS BANK, FSB, ANTHONY J. SISTI and AMERICAN SAVINGS BANK, FSB,

Defendants.

----------X

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Of Counsel

SPATT, District Judge.

The defendants move for summary judgment to dismiss the plaintiff's Complaint pursuant to Fed. R. Civ. P. 56(b), and to strike the plaintiff's jury demand as untimely filed. The plaintiff opposes the defendants' motions.

Having reviewed the documents submitted by the parties, having heard oral argument on October 29, 1993, and for the reasons stated in the record during oral argument, it is hereby

ORDERED, that the defendants' motion for summary judgment to dismiss the Complaint pursuant to Fed. R. Civ. P. 56 (b) is DENIED; it is further

ORDERED, that the defendants' motion to strike the plaintiff's jury demand as untimely filed is DENIED; and it is further

ORDERED, that the parties will proceed with jury selection, scheduled for November 8, 1993, at 9:30 a.m.

SO ORDERED.

Dated: Uniondale, New York
October 31, 1993

/s/

ARTHUR D. SPATT
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the 9th day of January , one thousand nine hundred and ninety-five.

PRESENT:

HON. FRANK X. ALTIMARI,
HON. PIERRE N. LEVAL,
HON. GUIDO CALABRESI,

CIRCUIT JUDGES.

----------X

LESLIE GURDON; LAKE IMPORTS, INC.; SMITHTOWN IMPORTED CARS, INCORPORATED; L&L CYCLES, LTD; and LAKE CYCLES, LTD.,

Plaintiffs-Appellants,

-v- Docket No: 94-6054

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of Riverhead Savings Bank, FSB and American Savings Bank, FSB,

Defendant-Appellee.

----------X

A petition for rehearing having been filed herein by plaintiffs-appellants Leslie Gurdon, Lake Imports, Inc., Smithtown Imported Cars, Incorporated, L & L. Cycles, Ltd., and Lake Cycles, Ltd.,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

GEORGE LANGE III, Clerk
by:

S/_____
Beth J. Meador
Administrative Attorney

Supreme Court, U.S.
FILED
DEC 18 1995
OFFICE OF THE CLERK

No. 95-622

In the Supreme Court of the United States

OCTOBER TERM, 1995

LESLIE GURDON, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF RIVERHEAD SAVINGS BANK, FSB, AND AMERICAN SAVINGS BANK, FSB

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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10 pp

QUESTION PRESENTED

Whether the district court erroneously excluded evidence and thereby vitiated the jury's determination that the failed bank had a good faith belief in the financial insecurity of the plaintiffs.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

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v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF RIVERHEAD SAVINGS BANK, FSB, AND AMERICAN SAVINGS BANK, FSB

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion and order of the court of appeals (Pet. App. A1-A5) is unpublished, but the decision is noted at 47 F.3d 1157 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1995. A petition for rehearing was denied on July 12, 1995. The petition for a writ of certiorari was filed on October 10, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The petitioners, four motor vehicle dealerships and their principal stockholder and president, Leslie

Gurdon, had a banking relationship with Riverhead Savings Bank (the Bank). That relationship consisted of checking accounts for the respective dealerships, six "direct loans" to two of the dealerships documented by eight notes, and certain "recourse" consumer loans for vehicle purchasers, so-called because the Bank had recourse to the selling dealership if the purchasers of the vehicles failed to pay. The petitioner corporations also executed automatic charge authorizations (ACAs), which allowed the Bank to deduct monthly payments from the dealerships' deposit accounts to pay interest owed on the loans. Pet. App. A2-A3.

Each loan document provided that the Bank was entitled to accelerate all of petitioners' loans and set off all the funds in petitioners' accounts against those loans (i) in the event of default in payment of any obligation to the Bank, (ii) if the financial condition of the borrower impaired the Bank's security or increased its risk, or (iii) if the Bank believed itself to be financially insecure with respect to the loans. Neither notice nor demand was required under the terms of the notes. Pet. App. A2-A3. Each of the loans was personally guaranteed by petitioner Gurdon and cross-guaranteed by the other petitioners. Pet. App. A3; Gov't C.A. Br. 9-10.

During October, 1988, the Bank began to receive a series of telephone calls from Marine Midland Automotive Financial Corporation (MMAFC). The calls were intended to verify balances on deposit at the Bank and to reconcile the records of MMAFC, which was the "floor plan" financer for the dealerships. Pet. App. A5; C.A. App. 921, 924-929. At that time, several of the recourse loans were in default. C.A. App. 234-240. On October 14, 1988, Gurdon contacted the

branch manager for the Bank's Bayshore, Long Island, office, Reynaldo Segui, in connection with the inquiries from MMAFC. Gurdon stated that there was a "shortfall" in the balances he had reported to MMAFC. After initially telling Segui simply not to supply any further information to MMAFC, he then changed his mind and suggested that Segui "could lie for about $100,000" in his conversations with MMAFC until Gurdon could make a deposit in the Bank. Segui refused to do so. *Id.* at 964, 969-973, 1058-1059.

After business hours on October 14, 1988, a deposit was made at Riverhead consisting of two checks in the sum of $70,000 and $50,000, respectively. C.A. App. 1227-1228. The checks were drawn on an account at Citibank, N.A., in Bayshore, Long Island, that had a balance at that time of $19,908. The checks later were returned through the check collection system unpaid due to insufficient funds. *Id.* at 1233-1234.

As a result of the above events, the Bank considered itself to be financially insecure. For that reason, *inter alia*, it accelerated petitioners' loans and set off against the deposits of petitioners a total of $512,000 to pay off the outstanding indebtedness. Within a few days of the setoff, the Bank also dishonored several of petitioners' checks, and the Bank compelled petitioners to pay eight recourse consumer loans on which they were signatories. Pet. App. A3.

2. Petitioners filed this action in July, 1989, in the Supreme Court for Suffolk County, New York. C.A. App. 23-50. Petitioners alleged that the Bank had wrongfully dishonored checks and had wrongfully set off their accounts against debts owed to the Bank. Riverhead Savings Bank had been acquired by American Savings Bank in the summer of 1988. Thereafter, both banks failed, and the FDIC was

appointed as Receiver of both banks. On September 10, 1992, the FDIC removed the case to federal court. Gov't C.A. Br. 2.

Trial commenced on December 9, 1993. The district court initially ruled that petitioners could introduce evidence of their course of dealing with the Bank, and petitioners introduced evidence concerning the ACAs. The court then reversed itself, however, and excluded that evidence. The court ruled that, under the doctrine of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and its statutory counterpart, 12 U.S.C. 1823(e), petitioners could not use the ACAs as evidence of the Bank's course of dealing to vary the terms of their written loan agreements. Under the court's ruling, petitioners could not use the ACAs to show that, because the Bank had the right under the ACAs to charge petitioners' accounts for loan payments that petitioners failed to make, those payments were not overdue. Pet. App. A3-A4.

The jury was instructed that petitioners had the burden of proving that the Bank had no right to accelerate petitioners' loans and exercise its right of setoff. It found that petitioners had failed to satisfy that burden. In particular, the jury returned a special verdict form that included findings that petitioners had failed to prove (a) that the loans were not past due when the Bank accelerated them and exercised its right of setoff, C.A. App. 1836-1838, and (b) that the Bank "could not reasonably have deemed itself, in good faith, to be financially insecure" at the time of acceleration and setoff, *id.* at 1838-1839. Accordingly, the district court entered judgment in favor of the FDIC. *Id.* at 1842.

3. The court of appeals affirmed in an unpublished opinion. The court rejected petitioners' contention

that the Bank had waived its right to rely on financial insecurity as a basis for its decision to accelerate petitioners' loans and exercise its right of setoff. Pet. App. A4. The court also held that there was sufficient evidence to support the jury's finding in favor of the FDIC on that point. Pet. App. A5. Therefore, the court held, regardless of whether the exclusion of the ACA evidence was proper, the Bank's financial insecurity provided an independent basis for the acceleration and setoff. The court accordingly did not reach the question whether the district court properly applied the *D'Oench, Duhme* doctrine or its statutory counterpart, 12 U.S.C. 1823(e), in its rulings excluding the ACAs. Pet. App. A5.

ARGUMENT

1. Petitioners argue (Pet. 13 n.10, 21-22) that the district court erred in ruling that the ACAs were irrelevant and that that error affected not only their ability to prove that the loans were not in default, but also their ability to prove that the Bank did not have a good faith belief that it was financially insecure. Therefore, according to petitioners, the court of appeals erred in affirming the judgment based on the jury's finding that they failed to prove that the Bank did not have such a good faith belief.

Petitioners' argument amounts at most to a claim that the the court of appeals, in affirming the judgment against them in an unpublished decision, misapprehended the significance of the ACA evidence in this case. Even if correct, petitioners' claim that the court of appeals misapprehended the record in this particular case would not warrant further review by this Court.

There was, in any event, ample evidence to support the jury's finding that the Bank reasonably believed itself to be financially insecure when it accelerated petitioners' loans and exercised its right of setoff. By October 21, 1988, when the acceleration and setoff occurred, Gurdon had asked the Bank's branch manager to misrepresent to MMAFC the balances in petitioners' accounts, C.A. App. 964, 969-973, 1058-1059; the Bank knew that Gurdon periodically had overdrawn accounts at several different banks, *id.* at 946-949; and the Bank knew that petitioner had attempted to deposit checks in the amount of $120,000 drawn on an account where only $19,908 was on deposit, *id.* at 1227-1228. That evidence was sufficient to support the jury's finding that the Bank reasonably believed itself to be insecure.

The fact that the Bank could have withdrawn payments from petitioners' accounts by using the ACAs would have been of no value to the Bank had petitioners simply withdrawn the funds in their accounts. If so, the ACAs could have done nothing to resolve the Bank's insecurity. The district court's ruling excluding the ACAs therefore had no bearing on the jury's finding that petitioners failed to meet their burden of showing that the Bank did not in good faith believe itself to be insecure.

2. Petitioners devote virtually all of their argument (Pet. 14-28) to their claim that further review is warranted to clarify the relationship between the *D'Oench, Duhme* doctrine and 12 U.S.C. 1823(e), and to consider the bearing of each on petitioners' arguments that the ACAs were admissible on the facts of this case. The court of appeals, however, did not reach any issue concerning the *D'Oench, Duhme* doctrine or Section 1823(e), since its result rested on

ordinary principles of commercial and contract law. Accordingly, this case is not an appropriate one in which to address the issues that petitioners believe warrant the Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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